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June 21 2003

No gazumping, please, we're Canadian

My client had just flown in from his home in England and was in the process of closing what, for me, was a fairly routine Toronto condominium purchase.

The title was clean, the lawyers were co-operating with each other, the agents were on-side, and there was no mortgage to worry about.

But I sensed my client was still extremely nervous. I asked him if he was worried about any part of the transaction. He explained that back in England, real estate deals frequently abort in the day or two before closing, and he was quite worried about being "gazumped."

This was only the second time in my career that I had heard that word. Gazumping, it turns out, is a common practice in the active real estate markets in places like England, Wales, Ireland and Australia.

Gazumping is what happens when a seller accepts an offer to purchase his house from a buyer, and then accepts a higher offer from someone else at the last minute.

Under somewhat archaic laws, a homebuyer's offer is not legally binding in England and Wales, even if it is accepted by the vendor. The offer does not become binding until what the British call the exchange of contracts the actual transfer of documents at the end of the process.

In Canada, an agreement of purchase and sale for a home or any other real estate is typically prepared by, or for, a purchaser in a matter of hours. Once it is signed by the buyer and seller, it becomes binding and enforceable before the ink dries on the contract.

If either party tries to renege on an unconditional deal, unpleasant things begin to happen and court documents start flying back and forth in short order.

By contrast, in England, all of the title and other searches are conducted after the offer is made but before the contract becomes binding. Studies have shown that the average length of time it takes for parties to agree on a purchase contract after an offer is submitted is eight weeks. Add another four weeks to close the transaction, and the total time lapse before the purchaser gets the key is typically 12 weeks.

During this lengthy process, it is perfectly legal for the buyer or seller to withdraw from the agreement at any time before the contracts are actually exchanged that is, in the eight week period it takes to get everything hammered out in writing.

In a hot property market, this allows the seller to invite higher offers up until closing day.

Vendors can accept higher offers with impunity, leaving the purchaser with substantial legal, surveying and mortgage costs but no house.

Under current British law, real estate agents are obliged to pass on all offers even if they arrive at the last minute.

A story in The Observer last year told the saga of Laura Williams who had spent about \$900 on closing costs and a home inspection for her flat, but received a curt phone call at the last minute telling her the deal was off.

"I was gazumped," she said. "I was really upset about it. I knew it went on, but I never thought it would happen to me."

Insurance is available to cover the lost costs, but is not popular because no one ever thinks gazumping will happen on their own deal.

A survey by the Yorkshire Bank last year showed one in 10 house buyers will gazump rivals to buy a property. Another study found that gazumping occurs in 2.5 per cent of residential transactions.

Numerous suggestions have been made over the years to stop the practice of gazumping, including making it illegal, adopting an exclusivity or lock-out contract which prohibits sellers from dealing with other buyers during a fixed period, and using a seller's pack which contains all the necessary title and other searches to shorten the delay before what we call closing.

Just as gazumping can hurt buyers and benefit sellers, there is another practice which can hurt sellers and benefit buyers. This practice (I'm not making this up) is called gazundering, which is gazumping in reverse.

Gazundering happens where the buyer has the upper hand and threatens, just before contracts are exchanged, to pull out of a house purchase unless the price is reduced.

Clearly, in places like England, Wales, Ireland and Australia, law reform is long overdue in this area. Fortunately, gazumping and gazundering are not part of the real estate landscape here in Ontario, and that's what I was happy to tell my British client.

His condo deal closed uneventfully.

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